Supreme Court, U.S.
FILED

No. 091182 MAR 29 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAYSHREE PATEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

GEORGE MCCALL SECREST, JR.
Texas Bar No. 17973900
BENNETT & SECREST, PLLC
808 Travis Street, 24th Floor
Houston, Texas 77002
(713) 757-0679
(713) 650-1602 (Fax)
gmsecrest@aol.com

Attorney for Petitioner Jayshree Patel

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the district court reversibly erred by instructing the jury, over objection of defense counsel, that it could find the defendant acted "knowingly" with respect to alleged violations of 18 U.S.C. § 1347 (health care fraud), if it concluded that the defendant had "deliberately closed his eyes to what would otherwise have been obvious to him," when the government failed to establish the necessary factual predicate warranting submission of the charge, thereby improperly diluting the *mens rea* requirement and authorizing conviction on a lesser standard.

PARTIES TO THE PROCEEDING

Petitioner is Dr. Jayshree Patel, defendant-appellant below. Additional defendants in the district court, who were parties in the court of appeals and are not parties here, were David Dennis Brown, Pius James Ekiko, and Charles Frank Skripka, Jr.

Respondent is the United States of America, appellee below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Factual Background and Trial	2
1. Dr. Lewis Gottlieb admitted to participation in the scheme to defraud Medicare but exculpated Dr. Patel	6
2. The prosecution adduced no medical testimony regarding acceptable standards of practice for power wheelchair evaluations	12
3. Physician confusion existed regarding Medicare coverage criteria for power wheelchairs and Medicare officials acknowledged that CMNs did not list coverage guidelines and were not completely consistent with coverage policy	16
4. Dr. Patel steadfastly denied any knowledge of or complicity in the scheme to defraud	20

TABLE OF CONTENTS – Continued

Page

B. Appellate Proceedings 22

REASONS FOR GRANTING THE PETITION..... 27

THIS COURT SHOULD GRANT REVIEW TO ADDRESS WHEN IT IS APPROPRIATE TO INSTRUCT JURIES AS TO "DELIBERATE IGNORANCE" OR "CONSCIOUS AVOIDANCE" WHEN THE CULPABLE MENTAL STATE OF "KNOWLEDGE" IS IN DISPUTE IN FEDERAL CRIMINAL TRIALS 27

A. The Factual Predicate Warranting Submission Of A Deliberate Ignorance Instruction To The Jury Was Wholly Deficient, Thereby Diluting the *Mens Rea* Requirement Of The Statute, And Is An Important Question..... 27

B. Circuit Decisions Are In Conflict Over The Applicable Standard For Giving The Instruction Which Can Serve To Dilute The Scienter Requirement Imposed By Congress In Enacting Criminal Statutes..... 33

CONCLUSION 36

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit filed November 23, 2009 *United States v. Brown, et al.*, 2009 WL 4034977 (unpublished opinion) .....App. 1

TABLE OF CONTENTS – Continued

Page

APPENDIX B

Judgment in a Criminal Case Entered October 9, 2007 ..... App. 24

APPENDIX C

Ruling of the United States Court of Appeals for the Fifth Circuit filed December 30, 2009 denying Petitioner's Motion for Rehearing... App. 37

APPENDIX D

Excerpts of the Indictment – *United States v. Patel*, Criminal No. CR H-04-349 ..... App. 39

APPENDIX E

Excerpts of the Trial Court's Instructions to the Jury at Conclusion of Trial ..... App. 50

TABLE OF AUTHORITIES

Page

CASES

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 32

Massachusetts v. Westcott, 431 U.S. 322, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977) 17

United States v. Aguilar, 80 F.3d 329 (9th Cir. 1996) 29

United States v. Alsont-Graves, 435 F.3d 331 (D.C. Cir. 2006) 27

United States v. Heredia, 483 F.3d 913 (9th Cir. 2007) 28, 29, 31, 32

United States v. Jewel, 532 F.2d 697 (9th Cir. 1976) (en banc), *cert. denied,* 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976) 27, 29

United States v. Kaplan, 490 F.3d 110 (2d Cir. 2007) 33

United States v. Lara-Velasquez, 919 F.2d 946 (5th Cir. 1990) 29, 31

United States v. Mari, 47 F.3d 782 (6th Cir. 1995) 34

United States v. McAllister, 747 F.2d 1273 (9th Cir. 1984) 30

United States v. Moreno, 185 F.3d 465 (5th Cir. 1999), *cert. denied*, 528 U.S. 1095 (2000) 22, 27, 30

United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977) 32

TABLE OF AUTHORITIES – Continued

Page

United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006) 33

United States v. Reissig, 186 F.3d 617 (5th Cir. 1999) 28

United States v. Rodriguez, 983 F.2d 455 (2d Cir. 1993) 34

United States v. Scott, 159 F.3d 916 (5th Cir. 1988) 29

United States v. Wisenbaker, 14 F.3d 1022 (5th Cir. 1994) 28

CONSTITUTION

United States Const., amend. V 1

STATUTES AND RULES

18 U.S.C. § 1347 2

28 U.S.C. § 1254(1) 1

Fed. R. Evid. 201(b) 16

Fed. R. Evid. 201(f) 17

OTHER AUTHORITIES

Black's Law Dictionary 459 (8th ed. 2004) 30

Decision Memo for Mobility Assistive Equipment (CAG-00274N), dated May 5, 2005, by the Centers for Medicare and Medicaid Services (CMS) 4, 5, 6

TABLE OF AUTHORITIES – Continued

Page

FIFTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTION 1.35 25

In the Case of Maximum Comfort, Inc. (September 29, 2003), 999-07-4140, et al., and 999-13-4741, et al. 14, 15

OIG Report (HHS), *Medicare Payments for Power Wheelchairs* (OEI-03-02-00600) (Washington, D.C.: April 2004) 19

The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, J. of Criminal Law and Criminology, Summer 1990 35

Willful Blindness as a Substitute for Criminal Knowledge, 63 Iowa L. Rev. 466 (1977) 35

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Fifth Circuit appears as Appendix A, App. 1-23, and is not published.

JURISDICTION

The Fifth Circuit entered judgment on November 23, 2009. A Petition for Rehearing *En Banc* was denied on December 30, 2009. (Appendix C, App. 37-38).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Const., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment by a Grand Jury . . . No person shall . . . be deprived of life, liberty, or property without due process of law.

Title 18, United States Code, § 1347

Whoever, knowingly and willfully executes, or attempts to execute a scheme or artifice –

(1) to defraud any health care benefit program: or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. . . .

STATEMENT OF THE CASE

A. Factual Background and Trial

In November of 2002, the F.B.I. commenced an investigation into motorized wheelchair fraud after complaints were received from Medicare beneficiaries that items were billed to Medicare but never delivered. United States Court of Appeals, Fifth Circuit, official electronic record ("USCA5") 4046. Requests were made for claims data from DME (Durable Medical Equipment) companies to determine what Medicare was actually billed for motorized wheelchairs

and scooters. (USCA5 4053).[1] In reviewing the claims data, the names of Drs. Lewis Gottlieb, Charles

---

[1] "Medicare" is a federally funded health insurance program that provides various health care benefits to individuals, primarily the elderly, the blind and the disabled. Under the Medicare scheme, benefits are segregated into "Parts" depending upon the type. During the time frame at issue in this case, Part "A" dealt with hospital services, Part "B" with medical services such as testing, physician and surgical procedures, and Part "C" with durable medical equipment such as wheelchairs, hospital beds, etc. (USCA5 4246-4247).

Like most government bureaucracies, it utilizes its own unique nomenclature. Medicare, itself, is administered by the Centers for Medicare & Medicaid Services or "CMS" which is an agency of the Department of Health and Human Services or "HHS." "Durable Medical Equipment" or "DME" refers to equipment designed for a repeated use and for a medical purpose, such as a motorized wheelchair; and includes hospital beds and diabetic, urological, and testing supplies. (USCA5 941). A company that supplies such equipment is known as a "DME" supplier. (USCA5 4050).

In order to submit bills to Medicare for payment, the DME company must be an approved Medicare supplier; once Medicare approves the supplier's application, a "supplier number" is issued which entitles the DME company to submit bills or "claims" for DME supplies provided to Medicare beneficiaries. Actually, the vetting and approval of a DME company is not done by a federal agency, but rather by the "NSC" or National Supplier Clearinghouse, which is a subsidiary of Palmetto GBA, the "DMERC" or "Durable Medical Equipment Regional Carrier," and both of these entities are owned indirectly by the Blue Cross Blue Shield Insurance Company. (USCA5 1012).

A "CMN" or "certificate of medical necessity" refers to HCFA FORM 843 which is a document executed by a physician to certify "to the best of my knowledge" that the patient is in medical need of the item prescribed. (*Id.*) Medicare requires that a CMN and a prescription be transmitted to the DME supply

(Continued on following page)

Skripka, Jayshree Patel, and other physicians in the Houston area were associated with many of the

---

company. (USCA5 4333). Each physician enrolled in the Medicare program is assigned a "unique physician identification number" or "UPIN" which should appear on the CMN and other Medicare documents. (USCA5 4175). Section "C" of the CMN should contain a narrative description of the equipment provided to the Medicare recipient and costs associated with the same and is filled in by the DME company. (USCA5 4213). The physician is to write his or her diagnosis of the Medicare beneficiary within Section "B" of the form and then affix his or her signature in Section "D." (USCA5 4213). The CMN is *not* forwarded to Medicare, however, but is retained by the DME company in the event there is an inquiry by Medicare which has the right to audit or inspect files of any company or physician with whom it does business. (USCA5 4214-4215). In order to apprise Medicare of the physicians' diagnosis of the beneficiary, the DME company includes it on the claim form it submits for reimbursement. (USCA5 4214).

The prosecution contended at trial that the Medicare criteria for a beneficiary to be entitled to a motorized wheelchair was that the "person had to be *bed confined or chair confined. . . .*" (USCA5 4047-4048). (Emphasis added). This criteria was communicated by the Medicare DME contractor to the DME suppliers and the DME contractor had no direct communication with physicians. And yet, just what the criteria actually was and perhaps, more important, what the *physicians' understanding* was of the criteria, became a much debated issue at trial and on appeal, in light of the recognition by senior Medicare officials that the "bed or chair confined" standard (which is no longer even in use having been replaced by a "function criteria") "impeded beneficiary independence, was confusing, and caused inconsistent interpretations by providers resulting in unwarranted *denials* of the benefits." *See Decision Memo for Mobility Assistive Equipment* (CAG-00274N), dated May 5, 2005, by the Centers for Medicare and Medicaid Services (CMS), p. 7. (Emphasis added).

claims that were submitted. (USCA5 4053). On January 14, 2003, the F.B.I. executed search warrants at three separate doctors' offices and two medical supply companies. (USCA5 4053). Germane to the present case, one of the locations searched by federal agents was a medical clinic located at 505 North Sam Houston Parkway, which was owned and operated by Dr. Lewis Gottlieb. (USCA5 4053-4054). Approximately seventy (70) boxes of documents were seized and carted out by the F.B.I. (USCA5 4054).

The government's theory of prosecution was that the defendants engaged in a conspiracy to bilk the federal government out of millions of dollars by submitting bogus Medicare claims for power wheelchairs and scooters provided to beneficiaries that were not medically necessary. (Appendix D, App. 45-49). Although several individuals entered into plea agreements and testified on behalf of the government at trial, Dr. Patel steadfastly denied any knowledge, and therefore, any complicity in the health care fraud scheme. She was acquitted of conspiracy (Count One), both wire fraud charges (Counts Twenty-Six and Twenty-Seven), and health care fraud alleged in Count Ten, but was convicted of health care fraud alleged in Counts Four through Six and Eleven through Seventeen. (USCA5 677-679).

1. Dr. Lewis Gottlieb admitted to participation in the scheme to defraud Medicare but exculpated Dr. Patel.

Dr. Gottlieb, who plead guilty and became the prosecution's star witness, testified that he began evaluating patients for motorized wheelchairs in October of 2001. (USCA5 4346). As his practice grew, he sold CMNs to DME supply companies or marketers who would bring Medicare beneficiaries to his clinic for evaluations. (USCA5 4352). He started charging $85.00 for each CMN that he executed, but the price went up to $200.00 because he knew the DME supply companies and marketers would pay it – and in cash. (USCA5 4351-4352). Between October 2002 and April of 2003, he operated his clinic in three separate locations. (USCA5 738, 746-747). He estimated that he was paid over $1 million in cash by selling CMNs and prescriptions to marketers and DME suppliers. (USCA5 798-799). Dr. Gottlieb never billed Medicare for power wheelchair evaluations, but rather for fraudulent Part "B" claims he submitted for psychiatric evaluations and lab tests (EKGs, bone scans and spirometry). (USCA5 732,798).

In the latter part of 2002, Dr. Gottlieb decided to hire additional physicians because he was tired of evaluating between 50 and 100 patients a day. (USCA5 752). After placing an ad in the Houston Chronicle, Drs. Patel and Skripka responded and were interviewed by him separately. (USCA5 753). Dr. Gottlieb was well aware Dr. Patel's medical background was in pathology and allergy and that she had

no training in physical or rehabilitative medicine, nor any experience in evaluating patients for power wheelchairs (and had never before executed a CMN for a power wheelchair), but he hired her anyway, telling her, "I will train you." (USCA5 820-822; 2559).

Dr. Gottlieb testified that "the criteria (for approving a Medicare beneficiary for a power wheelchair) is what is written on the certificate of medical necessity." (USCA5 813). Although he had heard the phrase "bed and chair confined" many times in his medical practice, it was not in the context of it "being the stated criteria for receiving a power wheelchair." (USCA5 816). He readily agreed that there are patients who can walk short distances although they have to stop, sit down and rest, but because of respiratory or neuromuscular problems, use a wheelchair within the home. (USCA5 815-816).

In order to determine eligibility for a power chair, Dr. Gottlieb prepared a "script" that he used when evaluating patients which consisted of approximately 15 questions. (USCA5 4353-4354). He testified that when Dr. Patel came to work for him, he instructed her, "'This is how it is done," and "showed her the script and I modeled it for her." (USCA5 822). Tellingly, he "*told her that it was the script that covered the information on this certificate of medical necessity.*" (USCA5 821-822). (Emphasis added). He communicated to her that patients would be coming in "to be evaluated for power wheelchairs and this is how you can find out if they need them or not. . . ." (USCA5 822). Dr. Gottlieb testified that the questions

contained in the script were "valid," were the kind of questions that would be asked by someone who was "seriously" evaluating someone for a power wheelchair and were framed to gather information "in the most direct and efficient way." (USCA5 822-823).[2] Dr. Patel observed Dr. Gottlieb evaluate approximately 200 patients over a three-day period before she evaluated a patient by herself. (USCA5 2571).

Of particular relevance to the case *sub judice*, Dr. Gottlieb testified that despite having several years' experience in physical and rehabilitative medicine and being familiar with durable medical equipment, "*with the average patient there is no test that he can give that would objectively determine whether or not the patient needs a power wheelchair, manual wheelchair or no wheelchair at all.*" (Emphasis added). (USCA5 818). He acknowledged that "a main part of any evaluation" is comprised of what the patient tells the physician and that generally, a physician will "trust what [the] patient reports to you during the exam . . . " and rely on that information. (*Id.*) He had

---

[2] The questions sought information about the existence of any cardiovascular, respiratory, neuromuscular, muscular skeletal, or other serious medical condition, that affected balance and the ability to walk even short distances; in addition, Dr. Patel wanted to know whether upper body strength was compromised which would preclude the use of a manual wheelchair. For example, Dr. Patel would ask patients whether they had fallen or experienced significant pain or shortness of breath when walking, or were able to hold relatively light objects without dropping them which would indicate muscular weakness in the upper extremities. (USCA5 822-830).

no knowledge of any reason why Dr. Patel should have distrusted what the patients were telling her during the course of the evaluation, and he at no time informed her that marketers or recruiters were telling the patients, on some occasions, how to answer questions. (USCA5 819).

Dr. Gottlieb was clear that he did *not*, at any time, give cash to Dr. Patel, nor did he tell her that he was receiving cash payments from marketers and recruiters. (USCA5 805-806). He even went so far as to instruct his office manager, Lucy Rodriguez, that "it was not Dr. Patel's business" he was receiving cash from marketers. (USCA5 806).[3] He never informed Dr. Patel of the scam he was involved in – "I never told her anything about that" – and did not discuss with her what was taking place at his clinic may be illegal; moreover, he never cautioned her not to tell others about what she was doing in the clinic for him. (USCA5 808, 821-822). He even confirmed that he did *not* conspire with her to commit health care fraud. (USCA5 864-865). He was looking to hire a physician who was willing to see a large amount of patients and conduct evaluations – the kind of work that was "tedious" and "wasn't the most fun or interesting work a doctor could do . . . " – and in "not the most

---

[3] Lucy Rodriguez confirmed she told the F.B.I. when interviewed that, as far as she knew, "Dr. Patel had no idea that Dr. Gottlieb was receiving cash from recruiters" and that Dr. Gottlieb told her, "Don't say anything to Dr. Patel, because it is none of her business." (USCA5 1460).

pleasant of surroundings. . . ." (USCA5 836). He never told her to fabricate anything, or even implied that to her. (USCA5 834). He freely acknowledged that he actually withheld incriminating information from her and kept her out of the nefarious loop he enjoyed with fellow conspirators. (USCA5 864-865). As he confirmed at trial, "I wanted her to work at the clinic, and I didn't want to say anything (to her) to change her mind from doing that." (USCA5 865). Dr. Gottlieb affirmatively represented to Dr. Patel that his clinic had actually been inspected by Medicare in May of 2002 (which would have been approximately four months before Dr. Patel was hired), had reviewed documentation in several patients' charts, and "okayed" his operation. (USCA5 837). He told her that he had informed the visiting officials "*very clearly over and over that we were evaluating for power wheelchairs.*" (USCA5 838). (Emphasis added).

Dr. Patel was not hired to supervise anyone at the clinic and did not do so. (USCA5 809).[4] She was not employed to order or evaluate any tests; the tests that were conducted on patients and ultimately billed to Medicare were ordered by Dr. Gottlieb. (*Id.*)[5] All

---

[4] Dr. Gottlieb agreed that neither Dr. Patel nor Skripka was hired to act as managers, answer telephones, deal with DME suppliers or recruiters and, to his knowledge, "had no contact with anyone other than the patients, one on one." (USCA5 917).

[5] Dr. Gottlieb confirmed he told Dr. Patel that he evaluated all test results and if there was a problem he would contact the patient so the information could be passed on to their physician. (USCA5 841).

billings to Medicare, whether for psychiatric evaluations or testing, were submitted under his Medicare provider number; Dr. Patel's Medicare number was never used. (*Id.*) He confirmed that Dr. Patel was not in a position to review any of his billings that were submitted to Medicare. (USCA5 810). In the final analysis, it is clear beyond peradventure (and never disputed by the prosecution) that the last thing in the world Dr. Gottlieb wanted was for Dr. Patel to know anything about his illegal dealings.

Dr. Patel was paid a fixed amount on a "weekly" basis, as opposed to a "per patient" basis, from the day she started until she left his employment. (USCA5 865).[6] Dr. Gottlieb did not tell her that she had to approve patients for motorized wheelchairs and, in fact, did not pay her more if she ultimately approved a patient. (USCA5 810-811). He agreed that he instructed Dr. Patel as to the criteria and method for examining patients "and left it up to her to determine whether a patient qualified. . . ." (USCA5 811).[7] Dr. Gottlieb confirmed that a patient was

---

[6] Dr. Patel only worked at Dr. Gottlieb's second clinic and, then, was only in his employ from mid-October of 2002 to January 14, 2003 – a period of approximately 90 days. This is crucial because the alleged scheme to defraud stretched from February 2, 2002 to "on or about June, 2003" – *a period of over 17 months.* (Appendix D, App. 19).

[7] The F.B.I. confirmed that a search of Dr. Gottlieb's offices revealed the existence of documents which established that Dr. Patel declined to execute CMNs and prescriptions for patients she did not believe met the Medicare criteria for a power wheelchair as she understood it. (USCA5 4312-4313).

actually evaluated for every CMN and prescription that was executed; at no time did Dr. Patel sign a CMN or prescription for patients that were not examined. (USCA5 812-813).

2. The prosecution adduced no medical testimony regarding acceptable standards of practice for power wheelchair evaluations.

The prosecution chose not to call any medical expert witness to testify regarding, among other things, what the acceptable standards of practice were for a physician with respect to evaluating patients for power wheelchairs, what tests, if any, should be administered, how much time an evaluation should take, what kind of questions should be asked of the patient, or what pre-existing medical conditions should be considered, before a CMN and a prescription is written and signed by a physician for a power wheelchair. Furthermore, the prosecution offered no testimony as to the existence of any Medicare rule or regulation, which sets forth the criteria governing when a prescription may be issued by a physician for a power wheelchair, nor has it done so on appeal. It is submitted that *no such criteria or guidelines even exist. Decision Memo for Mobility Assistive Equipment* (CAG-00274N), dated May 5, 2005, by the Centers for Medicare and Medicaid Services (CMS), p. 5, confirmed that:

> [a] search for published evidenced-based guidelines on the appropriate prescription of

> mobility assistive equipment, including canes, crutches, walkers, rolling chairs, wheelchairs and scooters, was conducted. *No evidenced-based guidelines were identified.* (Emphasis added).

As for "Professional Society Position Statements," the memo concludes that

> [a] search for published professional society position statements on the appropriate prescription of mobility assistive equipment, including canes, crutches, walkers, rolling chairs, wheelchairs, and scooters, was conducted. *No professional society position statements were identified.*

(*Id.*)

Nonetheless, the government argues that before a CMN could lawfully be issued, the patient's condition would have to be such that without the wheelchair, they would be "bed or chair confined," the wheelchair has to be medically necessary, the patient must be able to use the controls on the power wheelchair and unable to use a manual wheelchair. (Brief for Appellee – 36).[8] While that was the criteria

---

[8] Questions 1, 6 and 7 on the CMN pertained to motorized wheelchairs:

> (1) Does the patient require and use a wheelchair to move around in the residence?
>
> . . .

(Continued on following page)

for Medicare coverage (during the time frame of alleged scheme to defraud) provided by DMERCs to DME suppliers, government witness Kimberly Coffee confirmed that DMERCs do "*not send any information to the doctors regarding the criteria of coverage.*" (USCA5 1046). (Emphasis added). She acknowledged that the DME supply manual specifically utilized the word "usually" which meant that the Medicare beneficiary did *not* have to be "totally non-ambulatory" to qualify for a power wheelchair; moreover, nowhere within the CMN form, itself, is there any mention of a "bed or chair confined" requirement. (USCA5 1001-1002; 1005).[9] She further conceded that if a

---

(6) Does the patient have severe weakness of the upper extremities due to a neurologic, muscular, or cardiopulmonary disease/condition?

(7) Is the patient unable to operate any type of manual wheelchair?

See, for example, Govt. Ex. 104A, FirstChoice12-001419. As is readily apparent, **nowhere** in the CMN is the coverage criteria of "bed/chair" confinement addressed. And yet, not only is that the standard Medicare ascribed to power wheelchair coverage during the relevant time frame of the instant indictment, it is the identical criteria averred in the "manner and means" section of the health care fraud charges that the government contends the beneficiaries did not meet, resulting in the alleged submission of false or fraudulent Medicare claims. (Appendix D, App. 46).

[9] As the Medicare Appeals Council for the Department of Health and Human Services, Departmental Appeals Board had determined in its findings that ultimately were affirmed by the Ninth Circuit in *Maximum Comfort, Inc., supra,*

> the CMN does not solicit information concerning all of the coverage criteria listed in the DMERC's supplier

(Continued on following page)

physician determines a particular patient needs a power wheelchair the physician is free to prescribe it. (USCA5 1046-1047).

The government asserts that Dr. Patel apparently should have been familiar with the criteria in the DMERC manual because she executed a Medicare certification in 2001 when she obtained her Medicare Provider Number. (Brief for Appellee – 88).[10] Although she was provided a manual at that time, it did *not* address how a physician goes about evaluating a patient for a power wheelchair. (USCA5 2716).

> manual. For example, *although the coverage manual states that the patient's condition must be such that without the use of the wheelchair, the patient would otherwise be bed or chair confined, there is no question on the CMN that specifically expresses this coverage element.*

In the Case of Maximum Comfort, Inc. (September 29, 2003), 999-07-4140, et al., and 999-13-4741, et al., at 12. (Emphasis added).

[10] The government asserts that DME manuals were available for doctors to review. (Brief for Appellee – 33). Let's be clear here: Medicare published its rules and regulations in a *supplier* manual which was updated quarterly and sent to DME *suppliers*. (USCA5 942). "[T]owards the *latter* part of" 2002, the information became available "on-line" and was also published on a CD. (*Id.*) (Emphasis added). As previously argued, "based on Coffee's testimony, it is not apparent that this information was even available on the internet during most of the time that Dr. Patel worked for Dr. Gottlieb." (Brief for Appellant – 42, n.37). Regulatory material was *not* sent to doctors but rather to suppliers. (USCA5 1027, 1046).

It merely provided coding and billing information. (*Id.*)[11]

3. Physician confusion existed regarding Medicare coverage criteria for power wheelchairs and Medicare officials acknowledged that CMNs did not list coverage guidelines and were not completely consistent with coverage policy.

The government objected to Dr. Patel's reliance in her opening brief in the Court of Appeals on testimony before the United States Senate Committee on Finance by the Acting Principal Deputy Inspector General for the Department of Health and Human Services (HHS) and Reports submitted by the United States Accountability Office (GAO) to the United States Senate which made reference to several reports prepared by the OIG (Office of Inspector General) for the HHS. (Brief for Appellee – 150); (Brief for Appellant – 87-91). But beyond lodging its objection, the government did not cite a single case which called into question the propriety of Dr. Patel's contention that judicial notice of public records and government documents, pursuant to Fed. R. Evid. 201(b), can be

---

[11] The government never contradicted Dr. Patel's testimony in this regard either through the testimony of any DMERC official, or by calling any medical expert(s).

taken for the first time on appeal. (Brief for Appellant – 87-88, n.58).[12]

The cited material is particularly germane in light of the prosecution's decision to forego adducing any medical expert testimony at trial (or even testimony from a Medicare related government official, i.e., someone from the Centers for Medicare & Medicaid Services (CMS)). The government's strategic determination in this regard is telling. By *not* putting on an expert who could testify to Medicare's power wheelchair coverage criteria and related issues regarding applicable guidelines for the execution of CMNs by physicians, and, instead, choosing to rely on the testimony of a fraud investigator employed by a private company who had contracted with the federal government[13] – Kimberly Coffee – the government effectively foreclosed cross-examination as to admissions and findings made by Department of Health and Human Services (HHS) officials relating to the Department's awareness that:

- "coverage criteria for different types of mobility devices may not be explicit

---

[12] *See* Fed. R. Evid. 201(f) which specifically provides that "[j]udicial notice may be taken at any stage of the proceedings"; and *Massachusetts v. Westcott*, 431 U.S. 322, 323, n.2, 97 S.Ct. 1755, 1766, n.2, 52 L.Ed.2d 349 (1977).

[13] Ms. Coffee testified that she was a "program safeguard contractor" employed by Trust Solutions, a private company, who had replaced Palmetto GBA, who was owned indirectly by Blue Cross Blue Shield. (USCA5 1012).

enough, and physicians may not be familiar with Medicare's coverage criteria when ordering mobility devices for their patients";

- recommendations had been made to revise CMNs to actually incorporate key elements of power wheelchair coverage criteria and to educate physicians about the coverage criteria;
- the criteria listed on the CMN for power wheelchairs "*does not list coverage guidelines and is not completely consistent with coverage policy*";
- "[t]he CMN is more open to interpretation as to when a patient would require a power wheelchair than the coverage criteria";
- a review of 230 medical records of beneficiaries for whom claims had been submitted to Medicare in 2001 for power wheelchairs revealed that only 13% actually met the criteria![14]

---

[14] That figure is exceedingly telling. There was no suggestion in the report that the physicians who signed the CMNs in those cases were attempting to defraud Medicare and yet nearly 90% of the time their medical judgment and conclusions were at odds with Medicare's coverage criteria. The government's position that mis-diagnosing a large percentage of patients "demonstrates fraud" misses the mark. (Brief for Appellee – 35). How can it be claimed by the prosecution that Dr. Patel acted with deliberate ignorance when the criteria is not well understood by physicians, primarily because they (as opposed to DMEs) are not

(Continued on following page)

See Brief for Appellant – 86-90, citing testimony before the Finance Committee of the United States Senate by Dara Corrigan, Acting Principal Deputy Inspector General, Department of Health and Human Services (HHS), April 28, 2004; OIG Report (HHS), *Medicare Payments for Power Wheelchairs* (OEI-03-02-00600) (Washington, D.C.: April 2004).

The prosecution erroneously contended below that if a patient is ambulatory, i.e., capable of walking into and out of a doctor's office then, ergo, not only would the patient not qualify for a power wheelchair under the Medicare regime, a physician would be on notice that the person is not in need of one. As the record reflects, the lead prosecutor in Opening Statement omitted the word "usually" and actually represented to the jury that "[a]ccording to Medicare, a patient who requires a power wheelchair is *totally non-ambulatory*. . . ." (Emphasis added). (USCA5 3992). That, of course, is absolutely incorrect and patently misleading. (USCA5 1005). As government witness Coffee confirmed, a person could walk into a doctor's office from the parking lot "maybe after having stopped, after needing to stop to rest" and still could be "technically bed or chair confined." (USCA5 1004). Dr. Patel testified that along with considering other clinical information garnered by asking patients

---

provided information about it? When a CMN is disseminated for use which does not accurately reflect the actual criteria of the particular program in question, it is not at all surprising that a significant percentage of claims submitted will not pass review.

questions she believed were appropriate to the inquiry, she would observe the person's gait to see whether it was normal, and look for shortness of breath before deciding whether a patient qualified under Medicare for a power wheelchair. (USCA5 2575-2576).[15]

4. Dr. Patel steadfastly denied any knowledge of or complicity in the scheme to defraud.

Dr. Patel denied falsifying any CMN and testified that, at no time, did she have the intent to defraud Medicare. (USCA5 2586). She signed the CMNs "[b]ecause [she] believed those patients needed the wheelchair(s) and according to the CMN, . . . they met those criteria." (*Id.*) She did not do any independent research regarding Medicare coverage criteria pertaining to power wheelchairs, relying instead on Dr. Gottlieb, who had been practicing physical and rehabilitative medicine for several years and had assured her that the training he provided would

---

[15] Clinic employee Dora Maria Compos-Harvey testified that she kept notes from time to time and would write down the reasons given by Dr. Patel as to why a patient did not pass the evaluation. (USCA5 2499). On occasion, Dr. Patel would ask her what she thought about the way a person was walking and what she (the witness) observed of the patient once they left the clinic. (USCA5 2530-2531). This witness had a "birds-eye" view of the interaction between Dr. Patel and the patients and found Dr. Patel to be interested in them and appeared to listen closely to what they were telling her. (USCA5 2493).

qualify her to make the evaluations. (USCA5 2633-2634, 2663). She believed the criteria Dr. Gottlieb had given her to make the evaluations *was from the rules* and that the questions in the CMN were the "guidelines." (USCA5 1665-2666; USCA5 2729). She testified that she was not suspicious – "I didn't think there was anything wrong here." (USCA5 2642).

On January 14, 2003, after the F.B.I. executed the search warrant at Dr. Gottlieb's clinic, is the first time Dr. Patel began to suspect that something could be wrong. (USCA5 2579-2580). While Dr. Gottlieb was able to convince Dr. Skripka and staff members to return to work, Dr. Patel never did. (*Id.*) She also refused to allow Dr. Gottlieb to use her Medicare provider number simply because it was "not right." (USCA5 2585).

At the conclusion of trial, defense counsel specifically objected to the district court including an instruction to the jury authorizing a finding that the defendant acted "knowingly," as charged in the indictment, by reliance on a "deliberate ignorance" or "conscious avoidance" theory. (USCA5 3469-3470). The objection was overruled. (USCA5 4370). During final argument, the prosecutor specifically referenced the deliberate ignorance instruction:

> the doctors are trying to use what I call fraudulent deniability. They want to keep that, you know, in their mind the distance, so if, God forbid, this day ever came, they could get up there and say, I didn't know because.
>
> * * *

> You will hear from the Judge that with respect to the fraud counts, lying, cheating and stealing, if the defendant turns a blind eye to a fact that something that they should have seen that is clear on its face, that you can use that in your evaluation of whether or not they knowingly committed a specific act.

(USCA5 3911, 3929).

B. Appellate Proceedings

The Fifth Circuit concluded that the "deliberate ignorance" jury instruction which "rarely"[16] should be given in criminal trials was appropriate in this case. According to the Court,

> [t]he Government presented evidence of the high rate at which patients were being seen and approved for motorized wheelchairs, despite the fact that the patients were ambulatory at the time of the evaluation.[17] The

---

[16] *United States v. Moreno*, 185 F.3d 465, 476 (5th Cir. 1999), *cert. denied*, 528 U.S. 1095 (2000).

[17] Although Dr. Gottlieb testified he approved a high percentage of patients he saw over the several year period he operated clinics that screened patients for power wheelchairs (USCA5 4353), Dr. Patel only worked for Dr. Gottlieb for approximately three months (from mid-October 2002 until January 14, 2003) and *declined* to approve patients for power wheelchairs when she did not believe they met the CMN criteria. (USCA5 4312-4313). Myeshia Burnett, a former employee of Dr. Gottlieb who was called to testify for the government, confirmed that the number of patients did *not* increase after Drs. Patel and Skripka were hired. (USCA5 2258). Ms. Compos-Harvey, who

(Continued on following page)

was employed as an interpreter for Dr. Gottlieb, testified although Dr. Gottlieb complained that Dr. Patel was taking too long in conducting the evaluations she (Dr. Patel) continued to spend more time evaluating patients than what Dr. Gottlieb had requested. (USCA5 2506-2507). Lucy Rodriguez, Dr. Gottlieb's office manager, confirmed that after Drs. Patel and Skripka were hired, the patient evaluations took *longer to perform*. (USCA5 1413).

As for patients being ambulatory at the time of the evaluation, the government's own witness, Kimberly Coffee, acknowledged that medicare beneficiaries did *not* have to be "totally non-ambulatory" in order to qualify for a power wheelchair. (USCA5 1005). *See discussion, supra*, at 14-15. Tellingly, she confirmed that a doctor assessing whether a patient qualified for a power wheelchair would need to know about "upper body strength of the patient," as well as "lower body strength" and "even pulmonary problems." (*Id.*) And, as the record amply demonstrates, Dr. Patel consistently asked patients questions designed by Dr. Gottlieb which were relevant to identifying upper and lower body strength problems, as well as pulmonary deficiencies.

Glaringly absent from the Fifth Circuit's opinion and the Brief for Appellee is the undisputed fact that the Medicare beneficiaries who testified at trial chronicled the existence of serious, debilitating and chronic medical conditions and mobility related deficiencies in the home, that Dr. Patel could reasonably have considered and relied on (and did so) in deciding to issue a CMN. These government witnesses described various health related problems which fully warranted the issuance of a CMN for a power wheelchair, including, weakness in the upper extremities, tingling and numbness of the fingers, lack of a grip, inability to raise an arm to comb one's hair, constant dropping of objects, back injuries, shoulder injuries affecting the ability to lift and carry objects, inability to walk short distances without stopping and sitting down, history of falling down, needing to hold onto or lean against an object for support, not being able to walk far without running out of breath, being "terribly disabled," suffering from arthritis to the extent that "I couldn't

(Continued on following page)

Government also presented evidence that both Patel and Skripka were aware that the prescriptions and CMNs were not being delivered to the patients.[18] Further, the Government introduced evidence that the clinic was overcrowded with recruiters and DME suppliers, and that the patients were being brought in by the van-load from neighboring states.[19] Finally, the Government

---

hardly get up sometimes it was so bad," having previously broken their ankles and hips, having a history of disc problems, having a history of strokes, poor circulation and prior heart surgery, and having knee and hip problems that "will just give away . . . I may not be able to stand sometimes." (USCA5 1103, 1104, 1133, 1157, 1204-1205, 1232-1233, 1236, 1257, 1272-1273, 1276, 1284, 1289, 1317, 1322-1323, 1923, 1928, 1932, 1949, 2116, 2127, 2181 and 2185). Over 11 pages in the Brief for Appellant (pp. 45 through 55) were devoted to fully and accurately describing the medical problems that the patients presented with when they were evaluated by Dr. Patel.

[18] The record reflects that Dr. Patel had nothing to do with providing a copy of the CMN or the prescription to patients or to recruiters; pursuant to Dr. Gottlieb's orders, the clerical work was delegated to members of Dr. Gottlieb's staff. Lucy Rodriquez testified that she provided the CMN and the prescription to the recruiter in the office behind closed doors. (USCA5 1065). Both Rodriguez and Burnett testified they believed Dr. Gottlieb's clinic was a legitimate medical office. (USCA5 1456, 2268). In any event, power wheelchairs paid for by Medicare were only available from approved DME suppliers who would submit bills or "claims" to Medicare for payment. (USCA5 4050). *Medicare regulations require that a CMN and the prescription be transmitted to the DME supply company.* (USCA5 4333).

[19] The evidence demonstrated that Dr. Patel spent the vast majority of her time while at the clinic evaluating patients and did not mingle with the recruiters. (USCA5 2985, 3111). Dr. Patel testified that she never heard the words "marketers" or

(Continued on following page)

introduced evidence that both Patel and Skripka knew of the Medicare standard contained on the CMN form, but repeatedly certified patients that did not meet that standard.[20] This evidence raised an inference that Patel and Skripka were subjectively aware of a high probability[21] that illegal conduct was occurring at the clinic.

"suppliers" during her employment at the clinic. (USCA5 2571). She believed that Dr. Gottlieb had mentioned that drivers were bringing patients to the clinic (and had noticed that not all the individuals at the clinic were patients). (USCA5 2616). This caused her some concern although she did not know the drivers were being paid to bring patients to the clinic. (USCA5 2617). As the panel opinion recognized, the record reflects Dr. Patel was *unaware* that Dr. Gottlieb was receiving cash payments from marketers and recruiters. (USCA5 805-806). The record irrefutably establishes money was paid to the suppliers and marketers *outside* Dr. Patel's presence and that Dr. Gottlieb would come to the clinic after hours, after Dr. Patel had gone home for the day, to collect his bounty. (USCA5 1414). He instructed his staff *not to* discuss with Dr. Patel what he was doing with the recruiters and DME suppliers. (USCA5 1460).

[20] This conclusion is belied by the record. It is beyond dispute Dr. Gottlieb told Dr. Patel, who had no prior experience in physical or rehabilitative medicine, or in evaluating patients for power wheelchairs, that the questions he propounded for her to ask the patients "*covered the information on this certificate of medical necessity.*" (USCA5 821-822). (Emphasis added)

[21] FIFTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTION 1.35 *omits* the "high probability" language, in the text of the instruction and, therefore, does not require the jury to make such a determination; the instruction at issue herein omitted the "high probability" requirement, as well.

> The Government also presented circumstantial evidence that Patel and Skripka engaged in a 'purposeful contrivance to avoid learning of the illegal conduct.' Gottlieb testified that he warned Patel and Skripka that many doctors would refuse to sign the CMN form based on his interpretation because they did not want to certify those findings to Medicare.[22] Patel testified that she would simply shut her office door and ignore the persons in the clinic – including twenty or more recruiters present on a daily basis.[23] This evidence supports a conclusion that she purposefully contrived to avoid learning of the fraudulent scheme.

(Appendix A, App. 14-15).

---

[22] If the implication here is that Dr. Gottlieb was suggesting to Drs. Patel and Skripka that there was something *criminal* or even *potentially criminal* in signing CMNs, that is not a fair reading of the record, and, is contrary to Dr. Gottlieb's trial testimony, as explained previously.

[23] This conclusion is not borne out by the record evidence. Dr. Patel worked diligently in screening patients to determine if they qualified for a power wheelchair. She did not mingle with staff or those who brought patients to the clinic; she did not "hang out in the waiting room or walk around the office checking on people. . . ." (USCA5 1475-1476). The apparent implication that she simply closed her door to what was going on in other parts of the clinic unfairly characterizes Dr. Patel's sworn testimony and that of every other government witness and, therefore, is not supported by the record. Obviously, when she saw a patient, the door to her office was closed for the sake of a patient's privacy.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW TO ADDRESS WHEN IT IS APPROPRIATE TO INSTRUCT JURIES AS TO "DELIBERATE IGNORANCE" OR "CONSCIOUS AVOIDANCE" WHEN THE CULPABLE MENTAL STATE OF "KNOWLEDGE" IS IN DISPUTE IN FEDERAL CRIMINAL TRIALS

A. The Factual Predicate Warranting Submission Of A Deliberate Ignorance Instruction To The Jury Was Wholly Deficient, Thereby Diluting the *Mens Rea* Requirement Of The Statute, And Is An Important Question

"The substantive justification for the rule [that wilful blindness is equivalent to knowledge] is that deliberate ignorance and positive knowledge are equally culpable." *United States v. Jewel*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc), *cert. denied*, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976). Due to the inherent danger a jury may well conclude, by reliance on a willful blindness[24] instruction, that a defendant acted with the requisite culpable mental state, i.e., "knowingly," even in the absence of any evidence of *actual* knowledge that a crime was committed, and therefore is guilty of the charges alleged in the indictment, the instruction should *rarely* be given, *United States v. Moreno*, 185 F.3d 465, 476 (5th

---

[24] Also known as "deliberate ignorance," "conscious avoidance," or colloquially, as an "ostrich" instruction. *See United States v. Alsont-Graves*, 435 F.3d 331, 338 (D.C. Cir. 2006).

Cir. 1999), because it "has the potential to confuse the jury," *United States v. Wisenbaker*, 14 F.3d 1022, 1027 (5th Cir. 1994), and it also "run(s) the risk of encouraging the jury to convict on a lesser standard." *United States v. Reissig*, 186 F.3d 617, 619 (5th Cir. 1999).

As the Ninth Circuit has held,

> deliberate ignorance, otherwise known as willful blindness, is categorically different from negligence or recklessness. . . . A willfully blind defendant is one who took *deliberate* actions to avoid confirming suspicions of criminality. A reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; a negligent defendant is one who should have had similar suspicions but, in fact, did not.

United States v. Heredia, 483 F.3d 913, 918, n.4 (9th Cir. 2007) (en banc) (Emphasis in original). "'Willfulness' requires a 'purpose of violating a known legal duty,' or, at the very least, 'a bad purpose.' That is why wilful blindness is 'equally culpable' to, and may be substituted for positive knowledge. But to allow conviction without positive knowledge or wilful avoidance of such knowledge is to erase the scienter requirement from the statute." (*United States v. Heredia, supra*, at 926) (Kleinfeld, J., concurring).

Merely demonstrating that under the circumstances a reasonable person would have been aware of the illegal conduct, does *not* establish guilty

knowledge in light of the fact that the government must prove "the defendant was *subjectively* aware of a high probability of the existence of the illegal conduct." *United States v. Scott*, 159 F.3d 916, 922 (5th Cir. 1988). (Emphasis added). This "protects a defendant from being convicted for what he *should* have known. *United States v. Lara-Velasquez*, 919 F.2d 946, 952 (5th Cir. 1990). Accordingly, "[t]he key aspect of deliberate ignorance is the *conscious* action of the defendant – the defendant *consciously* attempted to escape confirmation of conditions or events he strongly suspected to exist." (*Id.* at 951). (Emphasis added).

A deliberate ignorance instruction "should not be given in every case in which a defendant claims a lack of guilty knowledge, but should be given only 'when there is evidence that the defendant has his suspicion aroused, but then . . . *deliberately* omits making an inquiry in order to avoid having actual knowledge." *United States v. Aguilar*, 80 F.3d 329, 331 (9th Cir. 1996) (en banc) (emphasis added) (*rev'd on other grounds, United States v. Heredia, supra*).[25] Therefore, in determining whether the jury should be instructed on deliberate ignorance, the focus is on the "defendant's actual beliefs and actions." (*Id.*) "A deliberate action is one that is 'intentional'; premeditated;

---

[25] Blindness is "willful" and differs from positive or actual knowledge "only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance." *United States v. Jewel, supra*, at 700.

fully considered." Black's Law Dictionary 459 (8th ed. 2004). A deliberate ignorance instruction must not only be "legally accurate" but also "*factually supportable.*" *United States v. Moreno, supra,* at 476. (Emphasis added). This is so because "*[a]n instruction given without an adequate factual basis may improperly lead the jury to infer guilty knowledge without proof of conscious avoidance of the truth.*" *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984). (Emphasis added).

Due to the absence of testimony from *any* witness that Dr. Patel *actually* knew that health care fraud was being committed, much less any evidence establishing her willful complicity in the scheme, the government's evidence at trial, at best, suggested she *should*[26] have known during the 90 days she was

---

[26] Because the jury instruction "explicitly warned the jury that 'demonstrating that the defendant was negligent, careless or foolish' was insufficient," (to show knowledge) the Fifth Circuit held that no abuse of discretion was presented. (Appendix A, App. 16, n.11). The problem with this conclusion, beyond the fact it fails to recognize that the instruction did *not* preclude a finding of "knowingly" by the jury based merely on *reckless* behavior, is that the district court defined "willfully" as meaning "*to act knowingly* and purposefully, with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law." (USCA5 653). (Emphasis added). (*See* Appendix E, App. 17).

The jury instructions, therefore, impermissibly authorized the jury to utilize the "conscious avoidance" component of "*knowingly*" when considering whether the government had proven that Dr. Patel acted "*willfully*" in allegedly committing health care fraud. To further exacerbate the problem, the Fifth

(Continued on following page)

employed by Dr. Gottlieb that she was facilitating the commission of crimes. Such a suspicion, if any, however, does not warrant submitting deliberate ignorance to the jury. *United States v. Lara-Velasquez, supra*. In any event, there was an inadequate factual basis to establish Dr. Patel was even suspicious[27] of *criminality*, much less that she deliberately took actions to avoid confirming such suspicions.

And even if the evidence warranted a determination of a "high probability of awareness of [a] circumstance" on Dr. Patel's part – which it does not – this is still "*not equivalent to knowledge in absence of 'wilful blindness.'*" *United States v. Heredia, supra,* at 927, quoting *United States v. Aguilar, supra*, at 332. (Emphasis added). Moreover, the Fifth Circuit did not conclude, nor could it, that the evidence which supposedly justified the instruction, was such that a rational jury could have reached the conclusion Dr. Patel was aware of a high probability of the facts in

---

Circuit held "the evidence is legally sufficient to support the jury's finding that Patel *knowingly* committed health-care fraud" (Opinion at 6, n.7) when it was strictly incumbent upon the government *additionally* to prove that she acted "*willfully*."

[27] With respect to a defendant's duty to investigate "suspicious" circumstances surrounding her alleged misconduct and/or relationship with another who, in fact, is guilty of criminal behavior, Judge Kleinfeld cogently observed: "[t]he imposition on people who intended no crime of a duty to investigate has no statutory basis. . . . The criminal duty to investigate the wrongdoing of others to avoid wrongdoing on one's own is a novelty in the criminal law." (*United States v. Heredia, supra*, at 928) (Kleinfeld, J., concurring).

dispute and consciously avoided confirming those facts *beyond a reasonable doubt. See United States v. Heredia, supra*, at 924 ("The instruction requires the jury to find beyond a reasonable doubt that defendant 'was aware of a high probability' of criminality and deliberately avoided learning the truth.")[28]

The government urged that because Dr. Patel supposedly "altered the CMNs (a question the Fifth Circuit did not even reach, *see* Opinion at 2) and did not state truthfully that none of the patients [she] certified for motorized wheelchairs was bedridden, wheel chair bound or non-ambulatory" this establishes "knowledge" on her part. (Brief for Appellee at 161).[29] Beyond the fact that the government has

---

[28] As Justice Kennedy (then Circuit Judge) has reasoned, "[t]he *Jewell* instruction *should not be given unless the evidence can sustain a finding, beyond a reasonable doubt,* that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged." *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1326 (9th Cir. 1977) (Kennedy, J., dissenting) (Emphasis added), overruled by *United States v. Heredia, supra. Cf. In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Due Process requires that the prosecution prove "'beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.'"

[29] But the "bedridden" and "non-ambulatory" issue is one that the government has overstated, if not created, for purposes of trying to impose criminal liability on physicians. The fact remains the CMNs did not fairly state the actual Medicare criteria, government agencies did not adequately educate physicians, as opposed to DME suppliers, as to Medicare's power wheelchair requirements, and the prosecution has promoted a "totally non-ambulatory standard," that is at odds with the

(Continued on following page)

misconstrued the "bed/chair confined" criteria, the record fairly demonstrates Dr. Patel reasonably relied on what Dr. Gottlieb assured her was the applicable Medicare standard and did not consciously seek to remain ignorant about Medicare's coverage criteria. Rather, any misunderstanding on her part arose from the construct of the CMS system, itself, which greatly restricted and limited the physician's role in the distribution of the DME item.

B. Circuit Decisions Are In Conflict Over The Applicable Standard For Giving The Instruction Which Can Serve To Dilute The Scienter Requirement Imposed By Congress In Enacting Criminal Statutes.

1. The Second Circuit requires that a deliberate ignorance charge may be included in the trial court's instructions to the jury only if "the evidence is such that a rational jury may reach the conclusion '*beyond a reasonable doubt* that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" *United States v. Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006) (Emphasis added); and *United States v. Kaplan*, 490 F.3d 110, 127 (2d Cir. 2007). As the Second Circuit has reasoned,

> The *standard for giving the instruction* logically should derive from the content of

---

regulations themselves, which, in fact, utilized the phrase "*usually* totally non-ambulatory."

> the instruction itself. Thus, since the instruction permits the jurors to infer knowledge only when persuaded beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact, ***the charge is warranted only if the evidence is such that a rational juror may reach that conclusion beyond a reasonable doubt***. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

United States v. Rodriguez, 983 F.2d 455, 458 (2nd Cir. 1993) (Emphasis added).

2. The Sixth Circuit has held that "[t]he Sixth Circuit Pattern Jury Instruction on deliberate ignorance, by its very terms, *only applies when there is sufficient evidence to support a finding of deliberate ignorance beyond a reasonable doubt*." *United States v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995). (Emphasis added).

The Fifth Circuit has not held that in order to justify submitting the issue to the jury in the first place a factual predicate must exist which supports a finding of deliberate ignorance beyond a reasonable doubt. And, clearly, no such finding was made in the case *sub judice*.

The "deliberate ignorance" or "conscious avoidance" jury instruction should "rarely" be given but, in truth and fact, it is a rare federal criminal prosecution where such an instruction does not infect the jury charge. The reason is patently obvious. It is

substantially easier for the prosecution to establish by circumstantial evidence that an accused deliberately avoided conducting an investigation with respect to his own conduct or his relationship with others, that is later deemed "suspicious," than to prove positive or actual knowledge. *See The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea,* J. of Criminal Law and Criminology, Summer 1990, n.55, citing Comment, *Willful Blindness as a Substitute for Criminal Knowledge,* 63 Iowa L. Rev. 466, 471 (1977). In the case *sub judice*, the deliberate ignorance jury instruction resulted in the evisceration of Dr. Patel's right to have *scienter* proven by the prosecution beyond a reasonable doubt. Jury confusion, as evidenced by notes sent out by the jury during deliberations,[30] and the risk of permitting conviction on a lesser standard, were rife in this case.

It is respectfully submitted that the time has come for guidance from this Court as to when such an instruction is appropriate, what the quantum of evidence must be in order for the instruction to be authorized in the first place, and specifically, what the jury must be informed with respect to this legal

---

[30] Absent from the Fifth Circuit's opinion is any acknowledgment that the jury sent out notes to Judge Gilmore during deliberations repeatedly seeking clarification of whether doctors were required to follow the rules/guidelines provided to DME suppliers and whether there was a doctors' manual in evidence. (USCA5 673, 675, 3544, 3545). Finally, Judge Gilmore told the jury, "Please use your own judgment." (USCA5 676). Shortly thereafter, the jury reached a verdict.

concept which profoundly affects the determination of whether the prosecution has proven the scienter requirement in a criminal case beyond a reasonable doubt.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE MCCALL SECREST, JR.
Texas Bar No. 17973900
BENNETT & SECREST, PLLC
808 Travis Street, 24th Floor
Houston, Texas 77002
(713) 757-0679
(713) 650-1602 (Fax)

Attorney for Petitioner
Jayshree Patel

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20471

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DAVID DENNIS BROWN; JAYSHREE PATEL; PIUS JAMES EKIKO; CHARLES FRANK SKRIPKA, JR

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-cr-00349-5

(Filed Nov. 23, 2009)

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:*

The appellants in this case were doctors, medical equipment suppliers, and marketers who were charged in a sixty-eight count indictment for conspiring to fraudulently bill Medicare for power wheelchairs.[1] They now appeal, raising numerous challenges to their convictions and sentences. We AFFIRM.

I. FACTS

Viewed in the light most favorable to the jury's verdict, the record establishes that appellants Jayshree Patel, Charles Frank Skripka, Jr., Pius James Ekiko, and David Dennis Brown acted to defraud Medicare by fraudulently issuing or marketing prescriptions for power wheelchairs.

Ekiko and Brown recruited Medicare beneficiaries to a clinic owned by Lewis Gottlieb, a licensed physician, by promising the patients a free power wheelchair and compensation for making the trip. Patel and Skripka, licensed physicians employed at Gottlieb's clinic, wrote the prescriptions for power

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Not all defendants were charged with all counts. The specific charges against each defendant-appellant are discussed below.

wheelchairs and certified to Medicare that the wheelchairs were medically necessary. Gottlieb then sold the prescriptions and accompanying certificates of medical necessity (CMNs) to suppliers of durable medical equipment (DME), including Ekiko. In turn, the DME suppliers provided the patients with motorized wheelchairs or scooters and sought reimbursement from Medicare for the cost of the equipment.[2] To maximize their profits, the DME suppliers, including Ekiko, often billed Medicare for a power wheelchair, but delivered a less-expensive scooter to the patient.

During the 2002 year, Gottlieb's clinic saw over one hundred patients per day. The doctors rarely spent more than a few minutes with each patient and approximately ninety-five percent of the patients were prescribed a power wheelchair. The high volume of patients receiving power wheelchairs covered by Medicare triggered an investigation by federal law enforcement officers.

Shortly thereafter, a grand jury handed down a sixty-eight count indictment. Among other things, the indictment charged Patel, Brown, Ekiko, and Skripka with conspiracy to commit health-care fraud, to violate the anti-kickback statute, to commit wire fraud, and to commit mail fraud. All were also charged with

---

[2] Medicare's "Part B" regulations authorize Medicare to reimburse suppliers of DME for the equipment they provide to Medicare beneficiaries. During the 2002 year, Medicare was reimbursing DME suppliers $4200 for a motorized wheelchair, and $1700 for a motorized scooter.

health-care fraud and aiding and abetting wire fraud. Ekiko and Skripka were also charged with aiding and abetting money laundering by concealment. Finally, Ekiko was also charged with aiding and abetting money laundering by promotion. At trial, Gottlieb and a DME supplier named Prince Yellowe testified as Government witnesses, having reached plea agreements with the Government.

Patel was convicted of ten counts of health-care fraud. Ekiko was convicted of the conspiracy charge, several counts of health-care fraud, wire fraud, money laundering by promotion, and money laundering by concealment. Skripka was convicted of the conspiracy charge, several counts of health-care fraud, one count of wire fraud, and several counts of money laundering by concealment. Brown was convicted of the conspiracy charge, several counts of health-care fraud, and aiding and abetting wire fraud. The instant appeal followed.

II. MERITS

Patel, Ekiko, and Skripka appeal their convictions and their sentences. Brown appeals his sentence.

A. Sufficiency of the Evidence Challenges

Patel, Ekiko, and Skripka challenge the sufficiency of the evidence to support their convictions.[3] When an insufficiency-of-the-evidence challenge is properly presented to the district court through a motion for judgment of acquittal, we ask "whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *United States v. Mauskar,* 557 F.3d 219, 229 (5th Cir. 2009), *cert. denied,* 129 S. Ct. 2756 (2009) (quotation marks and citations omitted). In evaluating the sufficiency of the evidence, we view "all evidence and all reasonable inferences drawn from it in the light most favorable to the government." *Id.*[4]

---

[3] Ekiko, Patel, and Skripka also attempt to adopt their co-appellants arguments through Federal Rule of Appellate Procedure 28(i). But challenges to the sufficiency of the evidence are fact-specific inquiries, and the appellants may not adopt or incorporate the arguments of their co-appellants through Rule 28(i). *United States v. Stephens,* 571 F.3d 401, 404 n.2 (5th Cir. 2009) (noting that sufficiency of the evidence challenges are fact-specific, barring application of Federal Rule of Appellate Procedure 28(i)).

[4] Patel asserts that this court reviews the sufficiency of the evidence de novo. That is incorrect. This court does review a district court's denial of a motion for judgment of acquittal de novo; however, even under that standard we ask whether a reasonable jury could find the evidence sufficient to support a finding of guilt beyond a reasonable doubt. *United States v. Percel,* 553 F.3d 903, 910 (5th Cir. 2008). Conversely, where "a motion for judgment of acquittal insufficiently preserves a claim, our review is only for a manifest miscarriage of justice." *United States v. McDowell,* 498 F.3d 308, 312 (5th Cir. 2007).

This standard applies regardless of whether the evidence is direct or circumstantial. *United States v. Mergerson*, 4 F.3d 337, 341 (5th Cir. 1993).

1. Patel

Patel asserts that the evidence is insufficient to support her convictions for health-care fraud because she did not knowingly or intentionally defraud Medicare. But the Government introduced evidence from which a reasonable juror could infer that, by signing the CMN form, Patel certified to Medicare that each patient was currently using a wheelchair, suffered from physical limitations that made a wheelchair necessary, and was incapable of using a manual wheelchair.[5] The Government introduced evidence

---

[5] Patel and Skripka argue that the requirements to receive a power wheelchair were ambiguous and inconsistent at the time the health-care fraud occurred. For the first time on appeal, they assert that this court should take judicial notice of congressional testimony regarding purported ambiguities in the Medicare coverage guidelines, which were disseminated through the DME suppliers' manual. We need not reach this issue because the Government introduced evidence from which a reasonable jury could conclude that Patel and Skripka were guilty of health-care fraud. The Government introduced evidence that Patel and Skripka were aware of the standard contained on the CMN form, and nonetheless certified patients for power wheelchairs who did not meet that standard. Because this evidence is sufficient to sustain Patel and Skripka's convictions for health-care fraud, we need not reach the issue of whether the requirements to receive a power wheelchair in the DME suppliers' manual were ambiguous. We note, however, that neither Patel nor Skripka presented any evidence that they relied on a reasonable

(Continued on following page)

that Patel approved patients for power wheelchairs who were able to walk into the clinic. Patel certified to Medicare that these patients required power wheelchairs without investigating whether they exhibited physical restrictions or were capable of operating a manual wheelchair, as required by the CMN. This is sufficient to support a finding that Patel committed health-care fraud. *See United States v. Ogba*, 526 F.3d 214, 232 (5th Cir. 2008) ("In signing these forms and certifying their truth, [the doctor] would have had to deliberately ignore the requirements for prescribing a wheelchair."), *cert. denied*, 129 S. Ct. 220 (2009); *Mauskar*, 557 F.3d at 230 (rejecting sufficiency of the evidence challenge to health-care fraud conviction where doctor was aware that the patient was able to jog at the time he prescribed a motorized wheelchair).

Patel claims – and the Government does not dispute – that she crossed out the words "and use" on the CMN form.[6] She asserts that, in doing so, she refused to certify that the patients were using a wheelchair at the time of the evaluation; rather, she certified only that she believed they would benefit from one, regardless of the Medicare standard. We

---

interpretation of the Medicare regulations when prescribing power wheelchairs; rather, they disavowed any knowledge of the substance of the regulations and claimed that they never received the DME suppliers' manual.

[6] Before Patel's crossing-out of "and use," this portion of the form read as follows: "Does the patient require and use a wheelchair to move around in their residence?"

need not reach the effect of Patel's crossing out this language because the Government introduced substantial circumstantial evidence that Patel had the requisite knowledge and intent to commit health-care fraud.

The record is replete with circumstantial evidence that Patel had constructive knowledge of Gottlieb's fraudulent scheme: the large number of patients in the clinic, Gottlieb's failure to review test results or adhere to the proper standard on the CMN, and the presence of recruiters and DME suppliers in the clinic. As we explain below, this evidence supported an instruction to the jury on deliberate ignorance, and the record contains sufficient evidence from which a reasonable jury could conclude that Patel was aware of the health-care fraud and acted to further Gottlieb's scheme.[7]

---

[7] While Gottlieb did withhold information regarding the kickbacks from Patel and Skripka, he did not conceal the substance of the CMN form, the prospect of criminal liability for falsely certifying patients, or the existence of the vast number of recruiters, DME suppliers, and Medicare beneficiaries in the clinic. Indeed, Gottlieb even warned Patel and Skripka that other doctors were unwilling to risk signing the CMN forms out of fear of liability. Thus, the evidence is legally sufficient to support the jury's finding that Patel knowingly committed health-care fraud.

2. Ekiko

Ekiko asserts that the evidence is insufficient to support his convictions for conspiracy and money laundering.[8] We conclude that the evidence is sufficient to support the challenged convictions.

The Government introduced testimony that Ekiko recruited Medicare beneficiaries to the clinic, paid Gottlieb for prescriptions and CMN forms, and billed Medicare for the cost of supplying power wheelchairs to these patients. This evidence is legally sufficient to support a conviction for conspiracy to defraud Medicare. *See, e.g., Mauskar,* 557 F.3d at 229.

The evidence also supports Ekiko's convictions for money laundering. Ekiko does not dispute that he deposited the money he received from Medicare into his bank accounts. This evidence is sufficient to support a finding that he used the money for an illicit

---

[8] Ekiko also raises a cursory challenge to his conviction for wire fraud. To the extent that he provides no factual or legal analysis of this challenge, he has waived the issue. *Jason D.W. ex rel. Douglas W. v. Houston Indep. Sch. Dist.*, 158 F.3d 205, 210 n.4 (5th Cir. 1998) ("[F]ailure to provide any legal or factual analysis of an issue on appeal waives that issue."). We also note that the Government introduced substantial evidence that Ekiko used the interstate wires to fraudulently obtain reimbursement from Medicare for the cost of providing power wheelchairs. Accordingly, the Government introduced sufficient evidence to support his conviction for wire fraud. *See, e.g., United States v. Pedrick,* 181 F.3d 1264, 1267-68 (11th Cir. 1999) (finding evidence that defendant submitted fraudulent billing claims to Medicare to be sufficient to support convictions for wire fraud).

purpose. *See United States v. Brown,* 186 F.3d 661, 668 n.12 (5th Cir. 1999) ("Courts have held that a promotion money laundering offense may occur when a defendant receives and deposits criminally derived funds, in which case the *deposit* of the funds is the transaction intended to promote the specified unlawful activity.").

3. Skripka

Skripka challenges the sufficiency of the evidence to support his convictions for conspiracy to commit health-care fraud, health-care fraud [sic], wire fraud, and money laundering by concealment. Reviewing the record in the light most favorable to the jury's verdict, Skripka's challenges fail.

First, the Government introduced sufficient evidence to support Skripka's conspiracy conviction. Prince Yellowe testified that Skripka knew that DME suppliers were paying cash kickbacks to the clinic because Skripka was present for many of the transactions.[9] Skripka asserts that Yellowe's testimony is not credible because he was testifying pursuant to a plea agreement with the Government. But this court reviews only the sufficiency of the evidence, not the

---

[9] Skripka argues that his conviction should be overturned because he was unaware of all members of the conspiracy. But the Government was not required to prove that Skripka knew all of the members of the conspiracy. *See United States v. Garcia Abrego,* 141 F.3d 142, 155 (5th Cir. 1998).

credibility of witnesses. *United States v. Brown,* 553 F.3d 768, 780 (5th Cir. 2008), *cert. denied sub nom Combs v. United States,* 129 S. Ct. 2812 (2009), *and cert. denied,* 78 U.S.L.W. 3177 (2009).

Second, the evidence is sufficient to support Skripka's convictions for health-care fraud. The Government introduced evidence that Skripka certified patients for power wheelchairs without conducting a meaningful physical examination, and with the knowledge that the patients failed to satisfy the Medicare requirements. The Government also introduced evidence that Skripka knew that Gottlieb was profiting from the issuance of prescriptions and CMNs, and Skripka continued to falsely certify patients for power wheelchairs.

In addition to this testimony, there was other circumstantial evidence before the jury that supported its verdict. This evidence includes the large number of patients being transported by Brown to the clinic each day and the dispensing of an unusually high number of power wheelchairs. In light of this evidence, a reasonable jury could readily conclude that Skripka was aware of the scheme to defraud Medicare and actively participated in the health-care fraud. *United States v. Achobe,* 560 F.3d 259, 264 (5th Cir. 2008), *cert. denied,* 78 U.S.L.W. 3171 (2009).

Third, the evidence is sufficient to support Skripka's conviction of wire fraud. In addition to the evidence demonstrating that Skripka was aware of the scheme to defraud Medicare, the Government

introduced evidence that Skripka opened up a bank account to allow Medicare funds to be deposited after Gottlieb's accounts were frozen by the FBI. Based on this evidence, a rational jury could find that Skripka was guilty of wire fraud. *See United States v. Stalnaker,* 571 F.3d 428, 436 (5th Cir. 2005) ("[O]nce membership in a scheme to defraud is established, a knowing participant is liable for any wire communication which subsequently takes place or which previously took place in connection with the scheme.") (quotation marks and citation omitted).

Finally, the evidence is sufficient to support Skripka's conviction for aiding and abetting money laundering by concealment. The evidence introduced at trial established that Skripka opened up multiple bank accounts for the purpose of concealing the Medicare funds from the Government. This evidence is sufficient to support a conviction for money laundering by concealment. *See Brown,* 553 F.3d at 787.

B. Improper Commentary on the Evidence

Ekiko argues that he was denied his right to a presumption of innocence because the Government referred to Ekiko as a "co-conspirator" when responding to a hearsay objection. Ekiko did not object at the time the statement was made; thus, the issue is reviewed for plain error. *United States v. Stephens,* 571 F.3d 401, 408 (5th Cir. 2009). To obtain relief, Ekiko must demonstrate (1) error; (2) that the error is plain; and (3) that it affected his substantial rights.

Id. Even if Ekiko meets that burden, this court still retains the discretion to "decide whether to reverse the conviction, which [it] generally will not do unless the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *Id.* (quotation marks and citation omitted).

Examining the Government's statement in context, Ekiko cannot demonstrate plain error or that the error seriously affected the fairness of the proceedings. Initially, he cannot even demonstrate that the Government's statement was improper. The Government merely stated an exception to the hearsay rule and did not elaborate or otherwise comment on the evidence. Further, the Government's statement was isolated, targeted at the court rather than the jury, and was only one statement during a lengthy cross-examination. Even assuming the Government's statement was improper, it was not prejudicial. *See, e.g., United States v. Hitt,* 473 F.3d 146, 161 (5th Cir. 2006). Accordingly, Ekiko's argument fails.

C. Deliberate Ignorance Instruction

Patel and Skripka assert that the district court erroneously gave the jury an instruction on deliberate ignorance. The district court gave three different instructions on deliberate ignorance for the health-care fraud, wire fraud, and money laundering concealment counts.

Patel and Skripka objected at trial to the deliberate ignorance instruction. Accordingly, we review

the decision to give the jury the instruction for an abuse of discretion.[10] *Ogba,* 526 F.3d at 230. We ask whether the district court's instructions, taken in their entirety, made "a correct statement of the law *and* whether [the instructions] clearly instruct [] jurors as to the principles of law *applicable to the factual issues confronting them.*" *United States v. Lara-Velasques* [sic], 919 F.2d 946, 950 (5th Cir. 1990) (quotation marks and citation omitted). The court's instructions must be legally accurate, as well as factually justified. *Id.* In assessing whether the evidence supports a given instruction, we view "the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Government." *Id.*

A deliberate ignorance instruction is warranted if the evidence at trial raises two inferences: "(1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposefully contrived to avoid learning of the illegal conduct." *Lara-Velasquez,* 919

---

[10] The Government asserts that Skripka did not object to the deliberate ignorance instruction as it related to the substantive wire fraud counts or money laundering counts. The Government concedes that the district court issued a pretrial order stating that an objection from one party would be deemed an objection by all parties, unless counsel "expressly opts out of an objection." But the Government argues that Skripka expressly opted out of the objection by stating that he had "no objections to the charge." We need not decide whether this is sufficient to opt out of the objection, because Skripka's challenge fails even under the more favorable abuse of discretion standard.

F.2d at 951; *see also United States v. Orji-Nwosu,* 549 F.3d 1005, 1009-10 (5th Cir. 2008).

Whether a defendant purposefully contrived to avoid learning of the illegal conduct may be established by direct or circumstantial evidence. "[W]here the facts raise a question about the conduct and intentions of someone other than the defendant . . . a deliberate ignorance instruction is appropriate." *Orji-Nwosu,* 549 F.3d at 1009 (citation omitted).

In this case, the Government presented substantial evidence from which a reasonable jury could conclude that Patel and Skripka were subjectively aware of a high probability of illegal conduct. The Government presented evidence of the high rate at which patients were being seen and approved for motorized wheelchairs, despite the fact that the patients were ambulatory at the time of the evaluation. The Government also presented evidence that both Patel and Skripka were aware that the prescriptions and CMNs were not being delivered to the patients. Further, the Government introduced evidence that the clinic was overcrowded with recruiters and DME suppliers, and that the patients were being brought in by the van-load from neighboring states. Finally, the Government introduced evidence that both Patel and Skripka knew of the Medicare standard contained on the CMN form, but repeatedly certified patients that did not meet that standard. This evidence raised an inference that Patel and Skripka were subjectively aware of a high probability that illegal conduct was occurring at the clinic.

The Government also presented circumstantial evidence that Patel and Skripka engaged in a "purposeful contrivance to avoid learning of the illegal conduct." Gottlieb testified that he warned Patel and Skripka that many doctors would refuse to sign the CMN form based on his interpretation because they did not want to certify those findings to Medicare. Patel testified that she would simply shut her office door and ignore the persons in the clinic – including twenty or more recruiters present on a daily basis. This evidence supports a conclusion that she purposefully contrived to avoid learning of the fraudulent scheme. *See, e.g., Orji-Nwosu,* 549 F.3d at 1009 (finding the purposeful contrivance requirement satisfied where the defendant accepted a strange explanation at face value without further investigation despite strong circumstantial evidence of a crime). Prince Yellowe testified that Skripka was present when cash payments were made for the CMNs. Skripka testified that, despite all of the circumstantial evidence of fraud, he accepted Gottlieb's statement that the clinic was in compliance with Medicare regulations. Based on this evidence, the district court was entitled to instruct the jury on deliberate ignorance.[11]

---

[11] Patel also argues that the district court's instruction diluted the mens rea requirement and gave the jury the ability to find her guilty if she "should have known" that criminal wrongdoing was occurring. But the court's instructions explicitly warned the jury that "demonstrating that the defendant was negligent, careless or foolish" was insufficient. Thus, the court

(Continued on following page)

D. Sentencing Errors

On appeal, Ekiko and Brown argue that the district court erred by applying a three-level enhancement to their sentences based upon a finding that they were managers or supervisors in the criminal scheme. Patel argues that the district court erred by applying a twenty-level enhancement to her sentence based upon a finding that she was responsible for an intended loss of almost $12,000,000.

1. Upward Adjustment for Role in Offense

Ekiko and Brown assert that the district court erred by adjusting their offense levels upward three levels based upon their roles in the conspiracy. The district court determined that Brown and Ekiko were managers or supervisors in the criminal activity and that the criminal enterprise was extensive. Accordingly, the district court raised Brown's and Ekiko's offense level by three. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(b) (2008). Brown and Ekiko challenge this determination on appeal.

a. Brown

Brown did not file any written objections to the presentence report (PSR), and he did not object to the

---

did not abuse its discretion by instructing the jury on deliberate ignorance. *Ogba*, 526 F.3d at 232.

imposition of the three-level enhancement at sentencing. As a result, this court reviews his objection on appeal for plain error. *United States v. Ronquillo,* 508 F.3d 744, 748 (5th Cir. 2007), *cert. denied,* 128 S. Ct. 2458 (2008).

On appeal, Brown argues that he was not a manager or supervisor. Specifically, Brown asserts that, at best, he "employed other people who in turn may have paid individuals brought to Houston as an incentive to take the trip." This concession alone is sufficient to support a finding that Brown was a manager. *Mauskar,* 557 F.3d at 235 (affirming district court's application of the enhancement because the defendant supervised at least one criminally responsible participant and the criminal activity charged was otherwise extensive). The evidence introduced at trial demonstrated that Brown brought in over 521 patients from the state of Louisiana during the August 22, 2002 to March 6, 2003 time period. Brown also offered to pay the Medicare beneficiaries extra money if they brought in patients on their own. In sum, Brown's actions demonstrate that he occupied a manager or supervisor role in the conspiracy. The district court did not plainly err by increasing his offense level by three for the role he played in the offense.

b. Ekiko

Ekiko argues that he did not have an [sic] manager or supervisor role in the offense because the

Government never established that the persons Ekiko supervised or managed participated in the fraud. Ekiko objected to the application of the three-level enhancement at sentencing. As a result, we review the district court's factual findings for clear error and the application of the sentencing guidelines de novo. *United States v. Gould,* 529 F.3d 274, 276 (5th Cir. 2008) We review the district court's determination that an individual was a criminally responsible participant for clear error, and ask whether the determination is "plausible in light of the record as a whole." *See United States v. Holmes,* 406 F.3d 337, 363 (5th Cir. 2005).

The commentary to U.S. Sentencing Guidelines § 3B1.1 states that a participant is "a person who is criminally responsible for the commission of the offense, but need not have been convicted." At sentencing, the Government argued that Allen Driver, King Robinson, Shenike Harrison and Michelle Morris were participants subject to Ekiko's control. Harrison testified that Robinson was hired to drive patients to the clinic and deliver scooters for Ekiko. Driver testified that he was hired to do the same. Ekiko asserts that these individuals were independent contractors, not employees. But the testimony established that Ekiko told the individuals where to go and what to do with the patients. The fact that Ekiko did not control every aspect of their employment does not preclude a finding that he supervised

their actions.[12] *Mauskar*, 557 F.3d at 235 (affirming application of three-level enhancement where testimony established that the appellant paid recruiters for referring patients, requested kickbacks and controlled which recruiters could bring patients in). Thus, the district court did not commit clear error in concluding that Ekiko occupied an aggravating role in the offense.

2. Upward Adjustment Based on Intended Loss Computation

Patel raised two objections to the calculation of her total offense level at sentencing. She renews both objections on appeal. First, she argues that her total offense level is not supported by the record because the jury acquitted her on the conspiracy charges. As a result, Patel asserts that she cannot be held

---

[12] Ekiko asserts in his reply brief that the offense was not extensive within the meaning of § 3B1.1 because he was not responsible for the bulk of the Medicare fraud. But the third comment to § 3B1.1 states that "[i]n assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." U.S. SENTENCING GUIDELINES § 3B1.1 cmt. n.3. In this case, the Government introduced substantial evidence that Ekiko utilized the services of Gottlieb, Patel, Skripka, and Rodriguez to defraud Medicare. In addition, the evidence demonstrated that Ekiko used recruiters to drum up business at Gottlieb's clinic and increase his profits. Thus, the evidence demonstrates that the offense was extensive.

responsible for amounts lost because of the conspiracy. Second, Patel claims that the PSR inappropriately relied on information that was beyond the scope of the trial witnesses' testimony.

The district court's determination of the intended amount of loss is a factual finding that we review for clear error. *United States v. Klein,* 543 F.3d 206, 214 (5th Cir. 2006). The district court's method of calculation, however, is reviewed de novo. *Id.*

Patel asserts that the amount of loss calculated is unfairly based on the conspiracy charge of which she was acquitted. The fact that Patel was acquitted of the conspiracy charge does not preclude the court from taking into account her participation in the scheme. This court has repeatedly held that "a jury's verdict of acquittal on some . . . counts does not prevent the sentencing court from considering conduct underlying the acquitted count as long as that 'related' conduct has been proved by a preponderance of the evidence." *United States v. Pineiro,* 470 F.3d 200, 206 (5th Cir. 2006).

Patel has not shown that the district court's enhancement of her sentence based on acquitted conduct was in error. She asserts only that the evidence suggests that her Medicare account was being used without her knowledge and that the testimony given in support of the district court's finding was based on speculation. She also asserts that she was not given a forum to confront witnesses. There is no basis for these assertions.

Agent Judy Sly of the Department of Health and Human Services testified that approximately $14 million was billed to Patel's unique physician identification number. Patel asserts that Agent Sly's testimony supports an inference that Patel's account was being used without her knowledge because each billing code was not supported by an accompanying signed CMN. But Patel does not deny that she presigned CMN forms and approved over ninety-five percent of her patients. Agent Sly's testimony established that the CMNs signed by Patel were then sold to DME suppliers who used the prescriptions to generate over $9 million in reimbursement fees from Medicare. Patel does not suggest that the district court's mathematical calculations were in error; rather she questions the credibility of the testimony relied on by the district court.[13] This is insufficient to warrant reversal of the district court's findings.

---

[13] Similarly, Patel's assertion that her signature was forged is unsupported by the evidence. Charlotte Ware, a handwriting expert, testified that only a few documents containing Patel's signature were an inconclusive match to Patel's handwriting sample. Her testimony does not support Patel's assertion that forgery was rampant or an inference that the bulk of Patel's CMN forms were forged.

III. CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Houston

UNITED STATES OF AMERICA
V.
JAYSHREE PATEL

JUDGMENT IN A CRIMINAL CASE

(Filed Oct. 31, 2007)

CASE NUMBER: **4:04CR00349-002**

USM NUMBER: 38797-179

Kent A. Schaffer
Defendant's Attorney

☐ See Additional Aliases.

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on counts(s) 4, 5, 6 and 11 through 17 on October 13, 2006. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1347	Health care fraud	12/19/2002	4
18 U.S.C. § 1347	Health care fraud	12/28/2002	5 & 6
18 U.S.C. § 1347	Health care fraud	01/04/2003	11
18 U.S.C. § 1347	Health care fraud	01/09/2003	12

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 1, 10, 26 and 27

☒ Count(s) 2, 3, 7, 25, 28 and 29 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 9, 2007
Date of Imposition of Judgment

/s/ Vanessa D. Gilmore
Signature of Judge

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

Oct. 31, 2007
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1347	Health care fraud	01/10/2003	13 & 14
18 U.S.C. § 1347	Health care fraud	01/13/2003	15, 16 & 17

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 78 months.

This term consists of SEVENTY-EIGHT (78) MONTHS as to each of Counts 4, 5, 6 and 11 through 17, to run concurrently, for a total of SEVENTY-EIGHT (78) MONTHS.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a facilty [sic] in Bryan, Texas, or to a facility as close to Houston, Texas, as possible.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.

This term consists of THREE (3) YEARS as to each of Counts 4, 5, 6 and 11 through 17, to run concurrently, for a total of THREE (3) YEARS.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. (*for offenses committed on or after September 13, 1994*)

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer

for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant is required to provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

The defendant is prohibited from possessing a credit access device, such as a credit card, unless first authorized the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$1,000		$9,477,349.00

A $100 special assessment is ordered as to each of Counts 4, 5, 6 and 11 through 17, for a total of $1,000.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
U.S. Department of Health and Human Services	$9,477,349	$9,477,349	

☐ See Additional Restitution Payees.

TOTALS $ 9,477,349.00 $ 9,477,349.00

☐ Restitution amount ordered pursuant to plea agreement $_____

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 1,000 due immediately, balance due

☐ not later than _____ , or

☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of $ _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of $ _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208

Balance due in payments of the greater of $25 per quarter or 50% of any wages earned while in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any balance remaining after release from imprisonment shall be paid in equal monthly installments as determined by the probation office to commence 60 days after the release to a term of supervision.

* In reference to the amount below, the Court-ordered restitution shall be joint and several with any co-defendant who has been or will be ordered to pay restitution under this docket number.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
4:04CR00349-003 Harold Horatio Iyalla	$9,477,349	$1,914,165	
4:04CR00349-004 Pius James Ekiko	$9,477,349	$384,106	
4:04CR00349-005 David Dennis Brown	$9,477,349	$2,188,200	

☒ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
4:04CR00349-002 Jayshree Patel	$9,477,349	$9,477,349	

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 07-20471

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID DENNIS BROWN; JAYSHREE PATEL; PIUS JAMES EKIKO; CHARLES FRANK SKRIPKA, JR.

Defendants-Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING EN BANC

(Filed Dec. 30, 2009)

(Opinion 11/23/09, 5 Cir., ___, ___, F.3d ___)

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc filed by appellant Jayshree Patel as a Petition for

Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc filed by appellant Jayshree Patel as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG6A

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO.
	§	CR-H-04-349
vs.	§	
CHARLES FRANK SKRIPKA, JR	§	18 U.S.C. § 371
JAYSHREE PATEL,	§	18 U.S.C. § 1347
HAROLD HORATIO IYALLA, aka PRINCE YELLOWE	§	18 U.S.C. § 1343
PIUS JAMES EKIKO,	§	18 U.S.C. § 1956(a)(1)(A)(i)
DAVID DENNIS BROWN,	§	18 U.S.C. § 1956(a)(1)(B)(i)
	§	18 U.S.C. § 1957
Defendants	§	

CRIMINAL INDICTMENT

(Filed Aug. 4, 2004)

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE
(Conspiracy – 18 U.S.C. § 371)

A. INTRODUCTION

At all times material to this Indictment:

THE MEDICARE PROGRAM

1. The Medicare Program ("Medicare") was a federally funded health insurance program that provided health care benefits to certain individuals, primarily the elderly, blind, and disabled. Medicare was administered by the Centers for Medicare and

Medicaid Services (CMS) an agency of the United States Department of Health and Human Services ("HHS"), formerly known as the Health Care Financing Administration ("HCFA"). Individuals who received benefits under Medicare were often referred to as Medicare "beneficiaries."

2. Medicare was a "health care benefit program" as defined by Title 18, United States Code, Section 24(b).

3. Medicare Part B helped pay for certain physician services, outpatient services, and other services, including durable medical equipment ("DME") that were medically necessary and were ordered by licensed medical doctors or other qualified health care providers. DME is equipment that is designed for repeated use and for a medical purpose, such as an electric or motorized wheelchair, also known as a "power wheelchair", a manual wheelchair or a power operated vehicle, also known as a scooter.

4. In Houston, Texas, the reimbursement rate for a K0011 motorized wheelchair is approximately $4,216.00. The reimbursement rate for a scooter is approximately $1,670.00.

5. HHS through CMS, contracted with Trail-Blazer Health Enterprises, LLC located in Dallas, Texas to process claims submitted by physicians and others [sic] health care providers.

DME Suppliers and Medicare Billing Procedures

6. In order to bill Medicare for DME equipment, a DME supplier had to be an approved Medicare supplier. The DME supplier obtained this approval by submitting an application to Medicare. If the supplier met certain qualifications, Medicare approved the application. The DME supplier was issued a number called a "supplier number." The DME supplier was then able to submit bills, known as "claims," for payment to Medicare for the cost of DME supplied to beneficiaries.

7. Medicare permitted approved DME suppliers to submit Medicare claims on paper or electronically. Medicare required that claims contain the following: the beneficiary's name and Medicare identification number; the name and unique provider identification number of the doctor who ordered the item or service; the item or service that was provided by the supplier; the date of service; and the charge for the item or service.

8. In Texas, Medicare Part B was administered by Palmetto Government Benefits Administrators, which had entered into a contract with the United States Department of Health and Human Services and CMS to serve as the entity or "carrier" that received, processed, and paid Medicare claims for DME, including those relating to power wheelchairs.

Power Wheelchairs and Certificates of Medical Necessity ("CMN")

9. Under Medicare rules, Medicare Part B would pay for the cost of a power wheelchair and accessories supplied to a beneficiary when the beneficiary had a serious, long-term medical or physical condition; a power wheelchair was medically necessary for the beneficiary; the beneficiary could not operate a manual (non-motorized) wheelchair; and the beneficiary was capable of safely operating the controls for a power wheelchair. To be eligible to receive a power wheelchair Medicare rules require that a beneficiary exhibit severe weakness of the upper extremities and be unable to walk over long periods of time.

10. In order for a DME supplier to be paid for providing a power wheelchair and accessories to a beneficiary, Medicare required the supplier to obtain documentation that the wheelchair was medically necessary. A specific document, called the HCFA Form 843, was required to establish medical necessity. On the HCFA Form 843, also known as a "CMN", the Medicare beneficiary's treating doctor was required to set forth the medical necessity for the power wheelchair. Among other matters, the doctor was required to certify that the beneficiary had severe weakness of the upper extremities due to a neurologic, muscular, or cardiopulmonary disease or condition; and, that the beneficiary was unable to operate any type of manual wheelchair. The doctor was also required to sign the CMN after attesting that he or she was the beneficiary's treating physician and the medical

necessity information was true, accurate, and complete.

11. The CMN included a section that described the power wheelchair and accessories that were ordered by the beneficiary's treating doctor and contained the DME supplier's charge for these items. This section of the CMN formed the basis for the bill that the DME supplier would send to Medicare in order to be paid for the cost of providing the power wheelchair and accessories.

12. A DME supplier who billed Medicare for the cost of a power wheelchair and accessories was required to submit the completed and signed CMN. If the claim was submitted electronically, then all of the information from the CMN was required to be submitted electronically. The supplier's date of service (DOS) is the date of delivery to the beneficiary's home.

THE DEFENDANTS AND ASSOCIATES

13. Lewis Gottlieb was a medical doctor licensed by the State of Texas to practice medicine and specialized in treating individuals suffering from mental and emotional problems.

14. Gottlieb was the owner of a medical clinic which operated at 505 North Sam Houston Parkway, Suite 150, Houston, Texas and 5960 South Loop East, Houston, Texas.

15. CHARLES SKRIPKA, JR., defendant herein, was a medical doctor licensed by the State of Texas to practice medicine. SKRIPKA, was an employee of the clinic owned by Gottlieb.

16. JAYSHREE PATEL, defendant herein, was a medical doctor licensed by the State of Texas to practice medicine. PATEL was an employee of the clinic owned by Gottlieb.

17. HAROLD IYALLA, aka, PRINCE YELLOWE, defendant herein, was the owner of 1st Choice Medical Equipment and Supplies located at 10103 Fondren Suite 242, Houston, Texas and 4240 Bluebonnet, Stafford, Texas.

18. PIUS JAMES EKIKO, defendant herein, was the owner of Horizon Medical Supplies located at 9898 Bissonnet, Suite 598I, Houston, Texas.

19. DAVID DENNIS BROWN, defendant herein, was a marketer who recruited medicare beneficiaries from Louisiana. Brown would transport these beneficiaries to Gottlieb's clinic in Houston to be evaluated by Gottlieb, SKRIPKA or PATEL for a motorized wheelchair/scooter.

* * *

COUNTS TWO THROUGH TWENTY-FOUR
(Health Care Fraud-Durable Medical Equipment) 18 U.S.C. § 1347

A. Introduction

1. Section A of Count One of this Indictment is realleged and incorporated as though fully set forth herein.

2. Beginning in or about February, 2002 defendants identified herein, billed, and aided and abetted the billing of, Medicare for services and goods allegedly provided to Medicare beneficiaries who were unlawfully referred to a health care provider for the purpose of authorizing and approving beneficiaries to receive a power wheelchair when they did not qualify under Medicare guidelines. As a result of this unlawful scheme, Medicare was billed in excess of $40 million and paid out in excess of $ 21 million for the false and fraudulent claims.

B. Purpose of the Scheme to Defraud

3. It was the purpose of the scheme to defraud to fraudulently obtain money from the Medicare/Medicaid programs by billing for evaluations and providing DME, namely power wheelchairs and accessories under procedure code K0011 as if they were required because:

b. the beneficiaries' medical condition was such that without the use of a power wheelchair, the beneficiary would otherwise be bed or wheelchair confined;

c. the beneficiaries' medical condition rendered them incapable of operating a manual wheelchair; and

d. the beneficiaries suffered from a neurologic or muscular disease/condition that resulted in severe weakness of the upper extremities;

C. Manner and Means

4. Paragraphs 22 through 49 of Section D of Count One of this Indictment are realleged and incorporated as though fully set forth herein.

5. It was a part of the scheme and artifice to defraud that the defendants would and did submit and cause to be submitted claims to the Medicare/Medicaid programs which were false or fraudulent in numerous ways including the following:

a. the beneficiaries' medical conditions were such that without the use of a power wheelchair, the beneficiaries would otherwise be bed or wheelchair confined;

b. the beneficiaries' medical conditions rendered them incapable of operating a manual wheelchair; and

c. the beneficiaries suffered from a neurologic or muscular disease/condition that resulted in severe weakness of the upper extremities;

D. Health Care Fraud

6. Beginning in or about February, 2002, and continuing thereafter to in or about June, 2003, in the Houston Division of the Southern District of Texas, the defendants

CHARLES SKRIPKA, JR
JAYSHREE PATEL
HAROLD IYALLA,
PIUS JAMES EKIKO, and
DAVID DENNIS BROWN,

identified in the specific counts below, did knowingly and willfully execute and attempt to execute a scheme and artifice to defraud a health care benefit program, and to obtain by means of material, false and fraudulent pretenses, representations, and promises, any of the money and property owned by, and under the custody and control of, a health care benefit program in connection with the delivery of and payment for health care benefits, items, and services, to wit; on or about the below listed dates, the defendant caused to be submitted false and fraudulent claims to Medicare for services in connection with the authorization and approval of beneficiaries to receive a power wheelchair in the amounts indicated below:

COUNT	DEFENDANT	PATIENT MEDICARE NO.	DATE OF SERVICE	CLAIM #	AMOUNT BILLED	FALSE CLAIM
2	J. Patel P. Ekiko	9369A	10/02/02	102287886285000	$8,993.12	Received Scooter & not medically necessary
3	J. Patel D. Brown	0675A	12/19/02	103003808334000	$8,993.12	not medically necessary
4	H. Iyalla J. Patel D. Brown	6895A	12/19/02	103003808342000	$8,993.12	Received Scooter & not medically necessary
5	H. Iyalla J. Patel D. Brown	7178A	12/28/02	103003808296000	$8,993.12	Received Scooter & not medically necessary
6	H. Iyalla J. Patel D. Brown	0474A	12/28/02	103003808297000	$8,993.12	Received Scooter & not medically necessary
7	P. Ekiko J. Patel D. Brown	9347A	12/29/02	103003860852000	$8,993.12	Received Scooter & not medically necessary
8	P. Ekiko C. Skripka	8243A	01/02/03	103011863712000	$8,463.12	Received Scooter & not medically necessary
9	P. Ekiko C. Skripka	1322A	01/02/03	103011863692000	$8,463.12	Received Scooter & not medically necessary
10	H. Iyalla J. Patel D. Brown	6087A	01/04/03	103007825433000	$8,993.12	Received Scooter & not medically necessary
11	P. Ekiko J. Patel	5971A	01/04/03	103011863719000	$8,538.12	Received Scooter & not medically necessary
12	H. Iyalla J. Patel D. Brown	7390A	01/09/03	103017813160000	$9,193.12	Received Scooter & not medically necessary
13	H Iyalla J. Patel	8423A	01/10/03	103023816057000	$9,743.12	Received Scooter & not medically necessary

	D. Brown					
14	P. Ekiko J. Patel D. Brown	4205D6	01/10/03	103015862043000	$8,463.12	Received Scooter & not medically necessary
15	P. Ekiko C. Skripka J. Patel	9648A	01/13/03	103016853529000	$8,993.12	Received Scooter & not medically necessary
16	P. Ekiko J. Patel	1162A	01/13/03	103016853355000	$9,068.12	Received Scooter & not medically necessary
17	P. Ekiko J. Patel	7041D2	01/13/03	103016853539000	$8,993.12	Received Scooter & not medically necessary
18	H. Iyalla C. Skripka D. Brown	0868A	01/17/03	103028821538000	$9,193.12	Received Scooter & not medically necessary
19	P. Ekiko C. Skripka	8774A	01/28/03	103035896270000	$8,463.12	Received Scooter & not medically necessary
20	H. Iyalla C. Skripka D. Brown	0421A	01/29/03	103036818570000	$9,023.12	Received Scooter & not medically necessary
21	H. Iyalla C. Skripka	5618A	01/23/03	103029815155000	$8,943.12	Received Scooter & not medically necessary
22	C. Skripka D. Brown	6282A	02/15/03	103052818392000	$9,003.12	Not medically necessary
23	H. Iyalla C. Skripka D. Brown	7418A	02/20/03	103052818417000	$9,003.12	Received Scooter & not medically necessary
24	H. Iyalla C. Skripka D. Brown	2763A	03/01/03	103069838869000	$9,023.12	Nothing received & not medically necessary

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	**CRIMINAL NO. H-04-0349**
CHARLES FRANK SKRIPKA, JR., ET AL	§	
	§	

COURT'S INSTRUCTIONS TO THE JURY

(Filed Oct. 27, 2006)

* * *

COUNTS TWO, FOUR THROUGH SEVEN, NINE THROUGH SEVENTEEN, NINETEEN, TWENTY AND TWENTY-TWO THROUGH TWENTY-FOUR

HEALTH CARE FRAUD

Counts two, four through seven, nine through seventeen, nineteen, twenty and twenty-two through twenty-four of the Indictment charge as follows:

Beginning in or about February, 2002, and continuing thereafter to in or about June, 2003, in the Houston Division of the Southern District of Texas, the defendants

CHARLES SKRIPKA, JR.,
JAYSHREE PATEL,
PIUS JAMES EKIKO and
DAVID DENNIS BROWN,

did knowingly and willfully execute and attempt to execute, a scheme and artifice: (1) to defraud a health care benefit program; namely the Medicare program; and (2) to obtain, by means of material false and fraudulent pretenses, representations, and promises, money and property owned by, or under the custody and control of, a health care benefit program, namely, Medicare, in connection with the delivery of and payment for health care benefits, items and services, namely power wheelchairs in violation of **Title 18, United States Code, Section 1347.**

Count	Defendant	Patient Medicare No.	Date of Service	Claim #	Amount Billed	False Claim
2	Ekiko	9369A	10/02/02	10228786235000	$8,993.12	Received Scooter & not medically necessary
4	Patel, Brown	6895A	12/19/02	103003808342000	$8,993.12	Received Scooter & not medically necessary
5	Patel, Brown	7178A	12/28/02	103003808296000	$8,993.12	Received Scooter & not medically necessary
6	Patel, Brown	0474A	12/28/02	103003808297000	$8,993.12	Received Scooter & not medically necessary
7	Ekiko, Brown	9347A	12/29/02	103003860852000	$8,993.12	Received Scooter & not medically necessary
9	Ekiko, Skripka	1822A	1/2/03	103011863692000	$8,463.12	Received Scooter & not medically necessary
10	Patel, Brown	6087A	1/4/03	103007825433000	$8,993.12	Received Scooter & not medically necessary
11	Ekiko, Patel	5971A	1/4/03	103011863719000	$8,538.12	Received Scooter & not medically necessary
12	Patel	7390A	1/9/03	103017813160000	$9,193.12	Received Scooter & not medically necessary
13	Patel, Brown	8423a	1/10/03	103023816057000	$8,743.12	Received Scooter & not medically necessary
14	Ekiko, Patel, Brown	4205D6	1/10/03	103015862043000	$8,463.12	Received Scooter & not medically necessary
15	Ekiko, Skripka, Patel	9648A	1/13/03	103016853529000	$8,993.12	Received Scooter & not medically necessary
16	Ekiko, Patel	1162A	1/13/03	103016853555000	$9,068.12	Received Scooter & not medically necessary
17	Ekiko, Patel	7041D2	1/13/03	103016853539000	$8,993.12	Received Scooter & not medically necessary

19	Ekiko	8774A	1/28/03	103035896270000	$8,463.12	Received Scooter & not medically necessary
20	Skripka, Brown	0421A	1/29/03	103036818570000	$9,023.12	Received Scooter & not medically necessary
22	Skripka, Brown	6282A	2/15/03	103052818392000	$9,003.12	Received Scooter & not medically necessary
23	Skripka, Brown	7418A	2/20/03	103052818417000	$9,003.12	Received Scooter & not medically necessary
24	Skripka, Brown	2763A	3/1/03	103069838869000	$9,023.12	Nothing received & not medically necessary

Title 18, United States Code, Section 1347, makes it a crime for anyone to knowingly and willfully execute or attempt to execute a scheme or artifice to defraud any health care benefit program.

For you to find a defendant guilty of this crime, you must be convinced beyond a reasonable doubt that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly and willfully executed or attempted to execute a scheme or artifice to either

Second: defraud a health care benefit program; OR

Third: obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program in connection with the delivery of or payment for health care benefits, items, or services.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the

defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

The word "willfully," as that term is used from time to time in these instructions, means to act knowingly and purposely, with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

A "scheme or plan to defraud" means any plan, pattern, or course of action involving a false or fraudulent pretense, representation, or promise intended to deceive others in order to obtain something of value, such as money, from the health care benefit program to be deceived.

A defendant acts with the requisite "intent to defraud" if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the institution to which it is addressed.

I instruct you that the Medicare Program is a "health care benefit program." A "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature of the alleged scheme, or that the alleged scheme actually succeeded in defrauding someone. What must be proven beyond a reasonable doubt is that the accused knowingly executed or attempted to execute a scheme that was substantially similar to the scheme alleged in the indictment.